

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ARNAZ WHALEY,

Defendant-Appellant.

UNPUBLISHED

June 16, 2009

No. 283712

Oakland Circuit Court

LC No. 2005-202404-FH

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530. He was sentenced, as a fourth habitual offender, MCL 769.12, to 342 months to 60 years in prison for his conviction. He appeals as of right. We affirm.

Defendant's first argument on appeal is that the trial court committed error requiring reversal when it denied defendant's motion for an evidentiary hearing regarding his motion to suppress the alleged illegally obtained DNA sample. We disagree. We review a trial court's decision whether to hold an evidentiary hearing for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). Even if erroneous, the admission of evidence is harmless if it did not prejudice the defendant. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998).

Defendant moved for a *Walker*¹ hearing, arguing that an evidentiary hearing be conducted regarding the circumstances surrounding the taking of the initial buccal swab sample from him so that the court could determine whether he voluntarily consented to give the sample. The trial court denied defendant's motion finding that it was moot given the fact that it had already ordered that defendant be retested. At the time that the trial court denied the motion, defendant had not yet been retested, and thus, the results of a retest were not yet known. As noted by defense counsel, the voluntary nature of the first test was still an issue at this point in time because if the retest resulted in a different result, the admission of the results of the first test

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

would become very important. At the time the motion was denied, the issue was therefore not moot.

However, defendant eventually complied with the trial court's order to submit a new buccal swab, thereby allowing defendant's requested re-testing of the DNA to occur, which subsequently produced the same results as the first test. Thus, any error in admitting the results of the first DNA test (based on involuntary consent) would be deemed harmless error as the re-test produced the same results, and therefore, the outcome of the proceedings would not be affected even if the results of the first test were not admitted into evidence. Accordingly, even if we were to find that the trial court abused its discretion when it denied defendant's motion for an evidentiary hearing, it follows that any such error would be harmless and would not require reversal. *Bartlett, supra* at 158.

Defendant next argues that he is entitled to resentencing because the sentence imposed by the trial court was an unjustified departure from the guidelines range and/or, in the alternative, was vindictive. Again, we disagree. We review a trial court's sentencing decision to determine, first, whether it is within the appropriate guidelines range and, second, if it is not, whether the trial court has articulated a "substantial and compelling" reason for departing from such range. *People v Babcock*, 469 Mich 247, 256, 259, 261-262; 666 NW2d 231 (2003). In considering a trial court's departure from the sentencing guidelines, the existence of a factor used for departure is reviewed for clear error, whether such a factor is objective and verifiable is reviewed de novo, and whether there is a substantial and compelling reason to justify a sentencing departure is reviewed for an abuse of discretion. *Id.* at 264-265.

Here, the parties do not dispute the fact that defendant's proper calculated guidelines range, as a fourth habitual offender, was 62 to 228 months, nor do the parties dispute that the trial court imposed a minimum sentence of 342 months. Under the statutory sentencing guidelines, a trial court may only depart from the guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record. MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The reasons for departure may not be based on an offense characteristic or offender characteristic already considered in determining the appropriate sentence range, unless the court finds from the facts contained in the record that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Abramski, supra* at 74. Further, the reasons must be objective and verifiable. *Id.* To be objective and verifiable, a reason must be based on actions or occurrences external to the mind and must be capable of being confirmed. *Id.* A substantial and compelling reason must be a reason "that 'keenly' or 'irresistibly' grabs the court's attention and is of 'considerable worth'" in deciding the length of a sentence. *People v Hendrick*, 472 Mich 555, 563; 697 NW2d 511 (2005).

Here, the trial court departed from the guidelines based on five factors: (1) the overall brutality of the offense, (2) eight prison misconduct tickets, (3) defendant's dishonesty to the court regarding the quality of his attorneys' performance, (4) an "astronomical" quantum of proof, and (5) unaccounted for prior record variable (PRV) points. The trial court further found that any two of its listed factors would justify the upward departure that it was making.

Although the trial court considered the general "brutal" nature of the crime when scoring 50 points under OV 7, it found that the "brutal" nature of strangling the victim for a prolonged period of time was not "appropriately accounted for." Given that the record supports the trial

court's findings, the findings are objective and verifiable. *Abramski, supra* at 74. Furthermore, given the overall brutality of the offense, we conclude that the trial court did not abuse its discretion in finding that the overall brutality was a substantial and compelling reason to support an upward departure. The trial court's first stated reason for departure is therefore a proper reason to depart from the guidelines. *Id.*

Defendant's eight prison misconducts since his last sentencing are also objective and verifiable. *Abramski, supra* at 74. The misconducts were not taken into consideration when scoring defendant's guidelines range, and furthermore, prison misconducts have been found to be substantial and compelling reasons to justify an upward departure. See *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995). The trial court's second stated reason for departure is therefore also a proper reason to depart from the guidelines. *Abramski, supra* at 74.

Defendant's PRV score of 125 is also objective and verifiable. *Abramski, supra* at 74. Given that a PRV score of 75 or higher places a defendant in the highest PRV level (level F), MCL 777.64, as a practical matter, defendant had 50 PRV points that were not accounted for in scoring defendant's guidelines, which our Supreme Court has held is a substantial and compelling reason to depart from the guidelines range. *People v Smith*, 482 Mich 292, 308-309; 754 NW2d 284 (2008). The trial court's fifth stated reason for departure is therefore also a proper reason to depart from the guidelines. *Abramski, supra* at 74.

If the trial court articulates multiple reasons, and we determine that some of the articulated reasons are substantial and compelling, but others are not, we must then determine if the trial court "would have departed and would have departed to the same degree" on the lone basis of the reasons that we found to be substantial and compelling. *Babcock, supra* at 260. If we are unable to determine whether the trial court would have departed to the same degree, or determine that the trial court would not have departed to the same degree, we must remand the matter to the trial court "for resentencing or rearticulation of its substantial and compelling reasons to justify its departure." *Id.* at 260-261.

Here, the trial court specifically noted that it would invoke the same sentence it invoked for "any two" of its listed five reasons. Thus, even if we were to find that the trial court's third and fourth stated reasons for departure (making misrepresentations to the court and an "astronomical" quantum of proof to support defendant's conviction) are either not objective and verifiable or are not substantial and compelling reasons to base a departure on, we must nonetheless affirm the sentence imposed upon defendant for his unarmed robbery conviction. *Babcock, supra* at 260-261; *Abramski, supra* at 74.

In regard to defendant's alternative argument, we note that a presumption of vindictiveness is raised when the same judge resentences a defendant a second time and the subsequent sentence is longer than the first sentence. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). In *People v Mazzie*, 429 Mich 29, 37 n 2, 42; 413 NW2d 1 (1987), a majority of our Supreme Court ruled that a "presumption of vindictiveness may be overcome only by objective information in the record justifying the increased sentence," *United States v Goodwin*, 457 US 368, 374; 102 S Ct 2485; 73 L Ed 2d 74 (1982), information that is new and was not available to the sentencing judge at the time the defendant's first sentence was imposed.

After defendant's first trial, defendant was sentenced to 264 months to 50 years in prison for his unarmed robbery conviction.² After defendant's second trial for the same incident, which is the subject of the appeal before us, the same trial judge sentenced defendant to 342 months to 60 years in prison for the same conviction, which raises a presumption of vindictiveness. *Colon, supra* at 66-67. However, as noted by the trial court, defendant was issued eight prison misconduct tickets between the trial court's imposition of defendant's first sentence and his second sentence, which is objective and verifiable. The trial court's presumptive vindictiveness has therefore been overcome. *Mazzie, supra* at 37 n 2, 42.

From what we can surmise, defendant's final argument on appeal raised in his standard 4 brief is that he was denied his constitutional right to the effective assistance of counsel. Given that defendant has not presented any legal arguments in his standard 4 brief, but rather, merely stated various points of fact, which may or may not be true, along with a small amount of legal authority that is not tied to any legal arguments, we decline to review the "issues" presented in defendant's standard 4 brief on appeal. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray

² Defendant's first conviction was vacated when the trial court granted defendant's motion for a new trial on the basis that he was denied his constitutional right to the effective assistance of counsel.